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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Estate of M.C., a Minor.

VALENSI ROSE, PLC,

Petitioner and Appellant,

v.

LAURA C. et al.,

Objectors and Respondents.

E056772

(Super.Ct.No. RIP087268)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge.

Reversed and remanded with directions.

Valensi Rose, PLC, M. Laurie Murphy, Bruce D. Sires and David Krol for
Petitioner and Appellant.

No appearance for Objectors and Respondents.

INTRODUCTION

Petitioner and appellant Valensi Rose, PLC, appeals from an order denying its unopposed petition for attorney fees and costs.¹ Petitioner contends that the court erred in finding, sua sponte, that the petition was barred by the statute of limitations and laches. We agree and reverse.

FACTS AND PROCEDURAL HISTORY

On September 28, 2011, petitioner filed a petition to recover attorney fees and costs for legal services it rendered to Laura C., the guardian of the estate of M.C. The petition requested attorney fees totaling \$24,414 for services rendered between June 1, 2006 and November 10, 2007. Requested costs totaled \$1,728.93. The legal services provided included the preparation and filing of the first account and other services.

The petition was heard before the Honorable H. Morgan Dougherty,² on November 3, 2011. Judge Dougherty was concerned about the applicability of the statute of limitations. The matter was continued for further briefing until November 17, 2011.

On November 16, 2011, petitioner filed a memorandum of points and authorities on the issue. The hearing regarding the petition was then continued to January 5, 2012. On January 5, 2012, the matter was heard by the Honorable James A. Cox. During that hearing, the court said: “[Code of Civil Procedure section 338] applies to any right for

¹ The order is appealable under Probate Code section 1300, subdivision (e), and Code of Civil Procedure section 904.1, subdivision (a)(10).

² Judge Dougherty is a retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

recovery based under statute, and the attorney's fees in guardianships and conservatorships are all governed by statute, and you waited like four years after the services were performed to come in to seek fees from this estate" Another continuance was granted and the matter was set for January 27, 2012.

At the January 27, 2012 hearing, the court stated that Probate Code section 1000, "adopts the rules under the [Code of Civil Procedure] when there are no similar rules within the Probate Code, and I do believe that this request for attorney's fees is beyond the statute of limitations." Accordingly, the petition was denied in its entirety.

DISCUSSION

The petition for attorney fees and costs was filed pursuant to Probate Code section 2642. That section provides that, "[a]t any time permitted by Section 2640, . . . an attorney who has rendered legal services to the guardian . . . may petition the court for an order fixing and allowing compensation for services rendered to that time." (Prob. Code, § 2642, subd. (a), italics added.)

Probate Code section 2642, subdivision (b), provides: "Upon the hearing, the court *shall* make an order allowing such compensation as the court determines *reasonable* to the attorney for services rendered to the guardian or conservator." (Italics added.) Under Probate Code section 2640, subdivision (a), the time permitted for filing a petition is: "At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters or any other period of time as the court for good cause orders"

Even though the petition here was filed approximately four years after the representation ended, petitioner argues that the petition was filed within the time prescribed by the Probate Code, and the limitation periods in the Code of Civil Procedure are inapplicable.

Probate Code section 1000, entitled “General Rules of Practice,” states: “*Except to the extent that this code provides applicable rules*, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.” (Italics added.)

We agree with petitioner that Probate Code sections 2640 and 2642 do provide ““applicable rules”” for the filing of attorney fee petitions. Accordingly, Probate Code section 1000 is inapplicable according to its terms.

Petitioner cites *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94 (*Hollaway*). In that case, a cotrustee, Hollaway, filed a petition for reimbursement of attorney fees incurred in defending an action filed by her cotrustee, Edwards. (*Id.* at p. 95.) Edwards sought to remove Hollaway as a trustee. The *Hollaway* court granted the petition for reimbursement, and Edwards then appealed. (*Ibid.*) Edwards argued that Hollaway was not entitled to reimbursement because the petition was untimely. (*Ibid.*) Hollaway

contended that the petition had to be filed within the 60-day period provided by California Rules of Court, former rule 870.2.³ (*Hollaway*, at p. 95.) Edwards also argued that Probate Code section 1000 applied the rules of practice applicable to civil actions to certain probate proceedings, and that the rules applicable to attorney fee requests in civil actions applied. (*Hollaway*, at pp. 97-98.)

Additionally, Hollaway argued that many provisions in the Probate Code authorize a trustee to hire attorneys to assist in trust administration. (*Hollaway, supra*, 68 Cal.App.4th at p. 97.) None of these provisions prescribe a time limit within which the petition must be filed. (*Ibid.*) Accordingly, Hollaway argued that there was no time limit. (*Ibid.*) The appellate court found that California Rules of Court, former rule 870.2, was inapplicable to probate proceedings. (*Hollaway*, at p. 98.) “Moreover, the probate court enjoys broad equitable powers over the trusts within its jurisdiction. [Citation.] This discretion derives not simply from judicial gloss, but from the Probate Code itself. For example, although Code of Civil Procedure section 1032, subdivision (b) entitles a prevailing party in ordinary civil litigation to costs as a matter of right, the probate court retains discretion to decide not only *whether* costs should be paid, but also, if they are awarded, who will pay and who [will] recover them. (Prob. Code, sec. 1002.) We are loath to circumscribe the probate court’s discretion by importing California Rules of Court, [former] rule 870.2’s strict time limits.” (*Id.* at p. 99.) The accompanying

³ California Rules of Court, former rule 870.2 was renumbered and amended as rule 3.1702, effective January 1, 2007.

footnote states: “This is not to say, of course, that prejudicial delay in the collection of attorney fees is defensible or sanctioned. But there has been no suggestion of prejudice here.” (*Id.* at p. 99, fn. 4.)

In the present case, there has been no opposition to the petition and no suggestion of prejudice, even though the guardian was represented by counsel at the various hearings. The court has broad equitable discretion to determine the reasonableness of fees, as stated in Probate Code section 2642, subdivision (b): “Upon the hearing, the court shall make an order allowing such compensation as the court determines reasonable to the attorney for services rendered to the guardian or conservator. The compensation so allowed shall thereupon be charged against the estate.”

But, unless Probate Code section 1000 is applicable, the court cannot impose the time limits of the Code of Civil Procedure sections limiting the time to bring various actions, including the three-year time period of Code of Civil Procedure section 338. (See Code Civ. Proc., § 335 et seq.)

We agree with petitioner that the applicability of those provisions is a legal issue subject to de novo review, and it is not a question of abuse of discretion. (*Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1641.)

The legal question is whether Code of Civil Procedure section 338 is applicable to a petition under Probate Code section 2642, due to the operation of Probate Code section 1000. As discussed *ante*, Probate Code section 1000 does not make Code of Civil Procedure section 338 applicable to a petition filed under Probate Code section 2642

because the applicable time limits are stated in Probate Code section 2640. The court therefore erred in denying the petition on statute of limitations grounds.

As petitioner points out, the statute of limitations and doctrine of laches are affirmative defenses, which must be personally asserted by the guardian. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581.) Although the guardian was represented by an attorney who appeared on her behalf at the January 27, 2012 hearing, those defenses were not asserted at that hearing or in this appeal. Accordingly, those defenses were waived and the court erred in applying those defenses on behalf of the guardian, sua sponte. (*Berendsen v. McIver* (1954) 126 Cal.App.2d 347, 351.)

POTENTIAL ISSUES

The petition asserts that petitioner represented the guardian from June 1, 2006, through November 10, 2007. However, the court stated that the substitution of attorney was filed on August 3, 2007. This difference raises the possibility that fees were claimed for work done after the substitution of attorney was filed.

The petition describes the legal services that were rendered as matters previously ordered by the court, which were not completed prior to filing the first account. These matters totaled 13.7 hours of time and \$4,273. It is alleged that these services do not duplicate the services under the heading “First Account Current.”

The second group of services during the representation period are services that were incurred in connection with the first accounting. Attorney fees and costs are sought for the preparation and filing of the accounting and representing the guardian at the

hearings on the accounting. Total hours claimed are 68.5, total attorney fees claimed under this heading are \$20,141, and total costs claimed are \$1,728.93.

The petition states: “On January 24, 2007, the Court settled, allowed and approved the First Account Current, granted attorney fees and reimbursement of costs, and ordered a bond.” Fees of \$18,750 were awarded, but no dollar sum is mentioned for cost reimbursement.

Although a fee request was apparently made in connection with the first account, the current petition subsequently states that “[n]o other request has been made for compensation for these attorney services and no payments have been made for these services.” The prior order raises questions concerning possible duplication of amounts claimed for attorney fees and costs.

ORDER ON REMAND

Although petitioner requests that we remand the case to the court with directions to enter an order granting the petition, we do not believe that payment should be ordered without the court’s determination of reasonableness under Probate Code section 2642, subdivision (b).

The court stated at the January 27, 2012 hearing that granting the petition would cause “extreme unfairness to the minor whose liquid assets now are probably about \$50,000. Your fee request constitutes over a half of the money that’s left.” The court should therefore exercise its equitable discretion to consider, on remand, whether the request is reasonable under Probate Code section 2642, subdivision (b).

The court should also consider whether any sums were paid under the court order of January 24, 2007, and whether the current petition seeks to relitigate the attorney fee award previously made as part of the first account. The court should then consider whether payment is being requested for services rendered after the filing of the substitution of attorney.

With regard to the request for reimbursement of costs, the court should apply Probate Code section 1002.⁴ It should also consider whether the same costs were awarded under the January 24, 2007 order.

DISPOSITION

The order denying the petition for attorney fees and cost is reversed, and the case is remanded with directions to the court to reconsider the petition in accordance with Probate Code section 2642, subdivision (b), and the views expressed in this opinion.

Petitioner shall recover its costs on appeal.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

KING
J.

⁴ Probate Code section 1002 provides: “Unless it is otherwise provided by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.”